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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Winstar Communications, LLC	)	WC Docket No. 02-80
Emergency Petition for Declaratory Ruling	)	
Regarding ILEC Obligations to	)	
Continue Providing Services	)	
	)	
Verizon Petition for Declaratory Ruling Regarding	)	
CLEC Obligations to Cure Assigned Indebtedness	)	

COMMENTS AND COUNTER-PETITION OF VERIZON

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TABLE OF CONTENTS

Before the
Federal Communications Commission
Washington, D.C.

In the Matter of	)	
	)	
Winstar Communications, LLC Emergency Petition for Declaratory Ruling Regarding ILEC Obligations to Continue Providing Services	)	WC Docket No. 02-80
	)	
Verizon Petition for Declaratory Ruling Regarding CLEC Obligations to Cure Assigned Indebtedness	)	

COMMENTS AND COUNTER-PETITION OF VERIZON[1/]

INTRODUCTION AND SUMMARY

Verizon's Comments on IDT's Petition. By its so-called "emergency" petition for declaratory ruling, IDT Winstar ("IDT") is attempting to game the Commission's rules and to make an end run around key provisions of the U.S. Bankruptcy Code and the U.S. Bankruptcy Court proceedings in the Winstar Communications, Inc. ("Winstar") case. IDT's petition is remarkable for its failure to disclose the facts most relevant to its petition — facts that preclude the relief it seeks — and for its misstatements of numerous other facts.

First, IDT fails to disclose that it already had nearly four months under an order of the Bankruptcy Court to provide appropriate notice of discontinuance to its customers and either

1/ The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. These are: Contel of the South, Inc. d/b/a Verizon Mid-States; GTE Midwest Incorporated d/b/a Verizon Midwest; GTE Southwest Incorporated d/b/a Verizon Southwest; The Micronesian Telecommunications Corporation; Verizon California Inc.; Verizon Delaware Inc.; Verizon Florida Inc.; Verizon Hawaii Inc.; Verizon Maryland Inc.; Verizon New England Inc.; Verizon New Jersey Inc.; Verizon New York Inc.; Verizon North Inc.; Verizon Northwest Inc.; Verizon Pennsylvania Inc.; Verizon South Inc.; Verizon Virginia Inc.; Verizon Washington, DC Inc.; Verizon West Coast Inc.; Verizon West Virginia Inc.

assume and assign, or reject, Winstar's former service arrangements with Verizon and other carriers.

Second, IDT fails to disclose that, under the same order of the Bankruptcy Court, and provisions of the Bankruptcy Code itself, it is clear that, if IDT decides to have Winstar assume any of its service arrangements and assign them to IDT, then Verizon is entitled to payment that "cures" Winstar's previous indebtedness associated with those service arrangements.

Third, IDT fails to disclose that it previously recognized its obligation to cure with respect to assigned circuits, and it engaged in negotiations with Verizon over the appropriate amount of cure for those circuits. IDT's current position is a reversal of its earlier stance and reflects a carefully choreographed legal and regulatory strategy designed to permit it to circumvent its cure obligations.

Fourth, IDT fails to disclose that, to the extent it has rejected Winstar's existing service arrangements, those arrangements are not part of what IDT purchased in the bankruptcy proceedings. As a result, customers served by the rejected circuits will be moved to their new carriers of choice through Verizon's established procedures for completing CLEC-to-CLEC transitions. If IDT is the new provider for some of those customers, it may initiate a new service arrangement and follow the same CLEC-to-CLEC migration procedures as any other carrier. (Or, where IDT elects to purchase a block of customer accounts but does not wish to purchase the rights to the existing network arrangements with Verizon, it may avail itself of the Commission's mass migration rules[2/] and proceed with the CLEC-to-CLEC migration procedures without obtaining individual customer consents.) Regardless of the new carriers

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[2/] In the Matter of 2000 Bienniel Review — Review of Policies and Rules concerning Unauthorized Changes of Consumers' Long Distance Carriers, 16 F.C.C.R. 11,218 (rel. May 15, 2001).

involved, Verizon will do its part to help coordinate the transition in order to minimize the impact on customers.

Fifth, IDT does not disclose that it wants *special* — not nondiscriminatory — treatment from Verizon and other carriers. The very transaction that IDT demands — the transfer to IDT *by mere name change* of circuits for which the bankrupt Winstar now is the customer — is available to IDT under *both* Verizon's tariffs *and* the bankruptcy law. But in both cases the availability of that option comes with a condition that IDT wishes to avoid: assumption of Winstar's debt. Only after the Bankruptcy Court rejected IDT's demand for special treatment did IDT come to the Commission.

For these reasons, the Commission should promptly reject IDT's petition, which is unsupported by any of the provisions of the Communications Act it cites. To do otherwise would exempt IDT without justification from its obligations under Verizon's tariffs and agreements, and frustrate not only the Bankruptcy Court proceedings but also the important public policies endorsed by Congress and reflected in the Bankruptcy Code.

Verizon's Counter-Petition for Declaratory Ruling. Verizon requests, pursuant to section 1.2 of the Commission's rules, that the Commission issue a declaratory ruling clarifying that (1) the Communications Act does *not* except carriers from the rights afforded by section 365 of the Bankruptcy Code, and (2) the type of transaction IDT seeks to effect — a transfer to IDT of the bankrupt Winstar's *existing* service arrangements with Verizon — would constitute an assignment within the meaning of Verizon's federal tariffs, and therefore that IDT would have to "assume[ ] all the outstanding indebtedness for such services, and the unexpired portion of the minimum period and the termination liability applicable to such services, if any." *E.g.*, Tariff

F.C.C. No. 1, § 2.1.2(A)(1).[3/] The transaction demanded by IDT is clearly covered by these provisions. IDT is buying Winstar's assets and seeks to take over the identical service arrangements that Winstar has with Verizon simply by changing the name on the account from "Winstar" to "IDT." In essence, IDT insists that it be permitted to stand in the shoes of Winstar before it became insolvent. This is a classic assignment.

Accordingly, the Commission should declare that the Communications Act does not except carriers from the same rights afforded other non-debtors under section 365 and that IDT's proposed transaction constitutes an "assignment or transfer" for the purposes of section 2.1.2 of Verizon's tariff and, therefore, that IDT must assume the outstanding indebtedness of Winstar to Verizon for services subject to the tariff. To the extent it does not promptly do so separately, the Commission also should issue a declaratory ruling clarifying the circumstances under which carriers in bankruptcy are required to give notice to customers of the possibility of a discontinuance or transfer.

BACKGROUND

A. Winstar's Bankruptcy and IDT's Efforts to Assume Winstar's Service Arrangements.

In April 2001, Winstar filed for bankruptcy under Chapter 11 of the U.S. Bankruptcy Code. The bankrupt Winstar at first focused on operating its business and, purportedly, on seeking to reorganize. But Winstar continued to lose money and continued to foist on its creditors, including Verizon, enormous, unpaid liabilities. Eventually, at a Bankruptcy Court hearing on December 18, 2001, Winstar acknowledged that it no longer could continue to

[3/] Other Verizon tariffs, such as the tariffs covering New York and New England, F.C.C. No. 11, and the former GTE states, contain language imposing similar cure obligations. *See* Tariff F.C.C. No. 11.

operate as a going concern and would have to liquidate its assets.[4/] IDT placed a bid of about $42.5 million for Winstar's assets and entered into an asset purchase agreement ("APA"). *See* www.idt.net/ir/IDT Corporation News Library/IDT Announces the Acquisition of Winstar Communications, Inc. (visited April 27, 2002) (identifying the Winstar purchase price as $42.5 million). In the ensuing hearing before the Bankruptcy Court, in a colloquy concerning IDT's obligations under Winstar's service arrangements with carriers (in particular, termination liability), IDT's counsel expressly acknowledged that, once IDT decided which circuits to keep, *it would have to pay a cure*. Specifically, describing IDT's plans with respect to the assumption and assignment, on the one hand, and rejection, on the other, IDT's counsel stated:

> We are going to go in and say yes, yes, yes, no, no, no. When we say yes, we'll cure it and we'll assume any termination liability is going forward. It's typical cure. I think everyone understands that it's not controversial.

December 18, 2001 Hearing Tr. at 246. Similarly, IDT's Chariman, Howard Jonas, testified that IDT would cure any defaults for any circuits it wanted to continued to use:

> The more likely scenario is SBC does business in let's say 20 states, you know, with Ameritech. So we may decide we're going to keep Chicago and Dallas, and we may decide we're not going to keep San Antonio.
>
> So then we say, okay, we rejected San Antonio. . . . *Now we understand if we accept Dallas and there's a past due on Dallas, we have to cure the past due in order to keep, you know, the contract past 120 days or whatever.*

4/ *See* Transcript of December 18, 2001 Hearing Before the Honorable Joseph J. Farnan, Jr., U.S. Bankruptcy Court ("December 18, 2001 Hearing Tr.").

Id. at 249 (emphasis added). A few hours after IDT made these representations, on December 19, 2001, the Bankruptcy Court entered an order approving the sale of Winstar's assets to IDT.[5] The sale closed that day.

Under the Sale Order and the APA, IDT had 120 days to review all of Winstar's executory agreements with Verizon and to decide, under section 365 of the Bankruptcy Code, which of those agreements it wanted to have assumed and assigned to IDT, and which it wanted to have Winstar reject. *See* Sale Order at ¶ 24; APA at § 2.5. In the event of rejection, Winstar could not assign its rights under an agreement to IDT and neither Winstar nor IDT would be liable under the Bankruptcy Code for future performance of the contract. 11 U.S.C. § 365 (g) (rejection "constitutes a breach of [the] contract.") In the case of assumption and assignment, IDT, as purchaser of Winstar's assets, would "be solely responsible for paying any cure payment that is payable in connection with any such assumption and assignment." Sale Order at ¶¶ 24 and 23(a); *see also* APA at § 2.5(b) ("If there exists any default related to an Assumed Agreement which is required to be cured as a condition to the Seller's assumption and assignment pursuant to Section 365(a) . . . the Buyer shall promptly cure any such default."). 11 U.S.C. § 365(b)(1)(A) (requiring trustee to "cur[e], or provid[e] adequate assurance . . . [of] cure, such default" upon assumption).

The Sale Order also gave Winstar and IDT 120 days to take the federal and state regulatory steps necessary to transfer Winstar's service arrangements to IDT, which included, among other things, securing approval of the asset transfers from state public utilities

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[5] *See* Order Authorizing (i) Sale of Certain of the Debtors' Assets Free and Clear of Liens, Claims Encumbrances, and Interests, (ii) Approving Cure Amounts With Respect to Certain Executory Contracts and Unexpired Leases, (iii) Authorizing the Debtors to Enter Into and Approving Management Agreement, (iv) Approving Regulatory Transition Process and (v) Granting Related Relief (Dec. 19, 2001) ("Sale Order").

commissions and filing notices of discontinuance required by this Commission and state commissions. *See* Sale Order at ¶ 23(a). The Order further required IDT to pay "all charges incurred for services used by [Winstar] to provide services to [Winstar's] [c]ustomers." *Id.* at ¶ 23(d).

On January 25, 2002, about a month into IDT's 120-day period, the Bankruptcy Court converted Winstar's bankruptcy to one for liquidation under Chapter 7. Shortly thereafter, the Bankruptcy Court appointed a Trustee. IDT subsequently informed Verizon of the relatively few executory service arrangements — resale and special access arrangements — that IDT was interested in assuming and assigning, and those it was rejecting as Winstar customers moved to other carriers. In February, March, and April of 2002, IDT sent several letters and emails giving Verizon "notice of its intention" to assume specific circuits — sometimes referred to by the parties as the "keepers."[6/] For the most part, the letters "advise[d] [Verizon] that [IDT] Winstar desires Verizon to transition to [IDT] [certain] circuits" and attached IDT-generated lists identifying the specific lines and circuits to be transitioned.[7/] In several of the letters, Winstar stated that it " ***requires only that Verizon change the billing information associated with the listed circuits (a billing change only or 'Record Order') in order to undertake the transition of***

6/ *See* February 26, 2002 Letter from Stephen V. Murray, Senior Director, to Antonio Yanez, Verizon — Vice President, *et al.* ("Feb. 26, 2002 Letter); March 27, 2002 Letter from Stephen V. Murray, Senior Director, to Antonio Yanez, Verizon — Vice President, *et al.* ("March 27, 2002 Letter"; March 28, 2002, Letter from Stephen V. Murray, Senior Director, to Antonio Yanez, Verizon — Vice President, *et al.* ("March 28, 2002 Letter); *see also* April 16, 2002 Letter from Geoffrey Rochwarger, CEO, Winstar Holdings, LLC to Arnall Golden Gregory, LLP, Attn: Darryl Laddin ("April 16, 2002 Letter").

7/ *See, e.g.*, February 26, 2002 Letter.

these circuits **. . . .**"[8/] In the case of resold customer lines, the letters also provided the "customer name and working telephone number" associated with the accounts IDT "desire[d] . . . to transition."[9/]

Consistent with these letters, IDT, at the suggestion of the Bankruptcy Court, also sought to reach an agreement with Verizon regarding the proper treatment of the Winstar circuits at issue in the bankruptcy proceedings. In particular, the parties engaged in negotiations over the appropriate cure to be paid in connection with Winstar's prepetition debt (Winstar owed Verizon approximately $13 million). IDT made an offer and Verizon made a counteroffer.

B. IDT's About-Face

On March 15, 2002, nearly three months after IDT purchased most of the assets of Winstar and two months after the Winstar bankruptcy was formally converted to Chapter 7, IDT finally provided approximately 3,600 customers in 17 states and in the District of Columbia notice of discontinuance of their domestic and international services. The notice, which stated that "Winstar must discontinue all LOCAL, LONG DISTANCE, TOLL FREE and INTERNET SERVICES you receive at the above referenced service address," provided customers with 30 days' notice of their need to "select a new carrier . . . to avoid any interruption of service." Exhibit A of Winstar Wireless, Inc. Section 63.71 Application (March.18, 2002). On March 18, 2002, IDT "filed an application . . . with the Commission requesting authority under section 214(a) of the Act and section 63.71 of the Commission's rules" to discontinue the services referred to in the customer notices. The Commission granted the application a month later. *See*

8/ February 26, 2002 Letter (emphasis added); March 27, 2002 Letter; March 28, 2002 Letter (identifying additional circuits to be transitioned).

9/ March 27, 2002 Letter.

Order, Application by Winstar Wireless, Inc. to Discontinue Domestic and International Telecommunications Services, Comp. Pol. File No. W-P-D-572, DA 02-911 (rel. April 18, 2002) ("FCC Order (April 18, 2002)").[10]

Also on March 18, 2002, Winstar's Trustee, joined by IDT, filed a motion in the Bankruptcy Court to extend the 120-day deadline for assuming and assigning, or rejecting, executory contracts. When that notice came before the Bankruptcy Court on April 15, 2002, it became apparent that IDT had abruptly changed course. At the April 15, 2002 hearing on the joint motion for extension of time, IDT argued — in the teeth of earlier statements by its Chairman and its counsel at the December 18 Bankruptcy Court hearing and IDT's letters to Verizon indicating an intent to assume certain Winstar circuits with no more than a name change — that, in fact, its intent never had been to have any of Winstar's agreements assumed and assigned to it.[11] Rather, it maintained that IDT had always intended to argue that there is an implicit exception to the Bankruptcy Code for agreements with carriers and that IDT can obtain all the benefits

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[10] The only other notice of discontinuance IDT provided focused on specific cities. *See* Exhibit A of Winstar Wireless, Inc. Section 63.71 Application (Feb. 25, 2002) (approving IDT application for permission to discontinue domestic and international service to customers in specific U.S. cities).

[11] In addition to being at odds with the correspondence IDT had sent Verizon, IDT's position was inconsistent with descriptions of the effects of the Sale Order contained in the regulatory requests it filed pursuant to that Order. For example, in its petition to the New York State Public Utilities Commission for approval of the sale and transfer of assets under the Sale Order, IDT indicated that it was "acquiring the core domestic telecommunications assets" of Winstar and repeatedly referred to itself as the "assignee." *See* Emergency Joint Petition of Winstar Wireless of New York, LLC and Winstar of New York, LLC for Approval of the Assignment of Assets and Authorization to Provide Telecommunications Services (filed January 17, 2002) at 1-2.

of those agreements without having to cure one penny in the prepetition defaults under those agreements. Thus, IDT's counsel informed the Bankruptcy Court:

> The concept of assuming the agreements with the carriers, I submit, simply makes no sense. These are not like leases where a landlord need not give you the premises unless you strike a deal. Or regular contracts, where people can bargain for whatever they want. These are agreements subject to the Telecommunications Act of 1996, which, very simply, provides that if Buyer as a licensed company wants services, and if the carriers as a licensed provider wants services, they have to do a deal. . . . It was never contemplated to assume these agreements. There's no reason to assume these agreements, because we're entitled to the services as a matter of Telecom Law.

Transcript of April 15, 2002 Motions Hearing Before the Honorable John C. Ackard, U.S. Bankruptcy Court ("April 15, 2002 Hearing Tr.") at 12-13. In short, IDT asked the Bankruptcy Court to confirm that, as a matter of "Telecom Law," IDT is "entitled" to take over, without any cure, what it had previously sought to have Winstar assume and assign to it. *Id.* at 13. The Bankruptcy Court rejected this request and denied the motion for extension of time on the record. *Id.* at 62-63.

At the same hearing, IDT also asked the Bankruptcy Court to enter orders preventing Verizon from exercising its basic rights to cease performance upon Winstar's rejection of its service arrangements with Verizon. The Bankruptcy Court addressed the issue from the bench in the presence of IDT's counsel:

> The Court will, therefore, provide that with respect to the contracts that are covered by the purchased assets, the final list of assumption or rejection is to be delivered, as the parties have all agreed, on April 18th. . . . If a contract or lease is not assumed, it is deemed rejected. The other party, the third party to any rejected or deemed rejected lease or contract can terminate its service and/or take possession of its property, subject again to any restrictions in the Telecommunications Act.

April 15, 2002 Hearing Tr. at 63.

On April 18, the Trustee, at IDT's behest, filed a Notice of IDT's Rejection of Certain of Winstar's Executory Contract and Unexpired Leases.[12/] And, although IDT had already lost its request for orders preventing Verizon from ceasing performance for contracts IDT had rejected, it attempted to resurrect that issue by filing an additional motion with the Bankruptcy Court. On April 19, 2002, the court again rejected IDT's argument and denied the motion.[13/] The court also entered an order formally rejecting the joint motion by the Trustee and IDT for extension of time to assume and assign, or reject, executory contracts. *See* Order on Trustee's Motion for an Extension of Time to Assume or Reject Executory Contracts and Leases, U.S. Bankruptcy Court for the District of Delaware (April 19, 2002) (granting only 2-day extension).

After repeatedly losing in the Bankruptcy Court, IDT filed its "emergency" petition before the Commission, and it filed a complaint and sought a temporary restraining order in the United States District Court for the District of New Jersey.[14/] As IDT makes clear in its petition and in its papers in district court, IDT does not want to choose from among the options available to all CLECs interested in transferring service arrangements. IDT does not want to pay the

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12/ *See* Notice of Rejection of Certain Executory Contracts and Unexpired Leases (April 18, 2002).

13/ *See* Order Denying Motion of Winstar Holdings, LLC to Enforce Injunction Against Stopping Services to debtors Before the Cutoff Date (April 19, 2002); *see also* Transcript of April 19, 2002 Hearing Before the Honorable John Akard, U.S. Bankruptcy Court Judge at 70-71. IDT has appealed the Bankruptcy Court's Order to the U.S. District Court for the District of Delaware. On April 22, 2002, the district court entered an order preventing Verizon and other service providers from "terminat[ing] any of the specified contracts, or reduc[ing] or adversely alter[ing] their performance under these agreements, until such time as a hearing on the matter may be held." *See* Order of U.S. District Court for the District of Delaware (April 22, 2002) at 2.

14/ Instead of entering a TRO, the U.S. District Court for the District of New Jersey recently entered a consent order in which Verizon, pending a May 21, 2002 hearing on the issues raised by the TRO, voluntarily agreed "not [to] discontinue, interrupt or otherwise interfere with the telephone service of current customers" of Winstar and IDT. *See* Consent Order & Briefing Schedule, U.S. District Court for New Jersey (April 22, 2002) at 2.

appropriate cure amounts that any other CLEC would have to pay on assumption and assignment of Winstar's existing service arrangements. IDT also does not want to use the same CLEC-to-CLEC transition process as other CLECs, including those CLECs that serve other Winstar customers. Instead, IDT wants *special* treatment. IDT proposes that Verizon simply substitute IDT's name for Winstar's on Winstar's already established service arrangements through a two-step process: have the Trustee reject the existing service arrangements (leaving Verizon with no way to recoup any of the prepetition debt owed to it); and then secure an order from this Commission or the U.S. district court that Verizon must transfer the circuits from Winstar to IDT, as if an assumption and assignment had taken place under section 365, *only without payment of the cure amount that provision expressly requires.*

In sum, the issue before the Commission is not whether ILECs are trying to force a "disconnect and reconnect" scenario on IDT. *See* Public Notice, DA 02-924 (rel. April 19, 2002). The real question is whether IDT is entitled to a transfer of Winstar's service arrangements in a transaction that has all the attributes of an assignment without incurring any of the liabilities that accompany such a transaction under Verizon's federal tariffs and the Bankruptcy Code. The answer to that question must be no. The Commission accordingly should deny IDT's petition and grant Verizon's counter-petition, as set forth below.

COMMENTS ON IDT PETITION

In support of its petition, IDT advances a spate of arguments that are uniformly without merit. Each of those arguments looks at the issue before the Commission through a half lens that blocks out the terms and policies underlying the Bankruptcy Code. But even if that were not so, nothing in the Communications Act or sound policy supports IDT's position.

I. SECTION 365 ARTICULATES THE CORE PRINCIPLE OF BANKRUPTCY LAW.

By failing even to mention section 365 of the Bankruptcy Code in its petition, IDT tries to give the impression that section 365 has absolutely no bearing on the matter now before the Commission. Nothing could be farther from the truth. Section 365 articulates core bankruptcy principles and sets forth the process to be followed in bankruptcy cases. That section unambiguously requires a debtor (or trustee) to cure any defaults — both prepetition and postpetition — as a condition precedent to the assumption, or to the assumption and assignment, of any executory contract. It specifically provides:

> [I]f there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee . . . cures, or provides adequate assurance that the trustee will promptly cure, such default . . . .

11 U.S.C. § 365(b)(1)(A).

Under this provision, a debtor or trustee may decide whether to assume and assign, or reject, any executory contract, subject to bankruptcy court approval. *See id.* at § 365(a). If the contract is not of value, the debtor or trustee may reject the contract. In that case, neither the debtor or trustee, nor any buyer of the debtor's assets, is liable under the Bankruptcy Code for future performance of the contract, but correspondingly the non-debtor party to the contract also need not perform, and the existing contract rights may not be assigned by the debtor or trustee to any buyer or other third party. 11 U.S.C. § 365(g) (rejection constitutes breach of contract).

In contrast, contracts that the debtor or trustee assumes may be assigned to purchasers, and the purchasers then became liable for the amount of the debtor/trustee's indebtedness and must provide a "cure" for that amount. *Id.* at § 365(b)(1)(A). As a practical matter, that rarely means that the purchasers will pay the full amounts of indebtedness; rather, the vendors and purchasers negotiate an amount that takes into account the overall value of the debtor's business and the desirability to the purchaser of the continued use of the service arrangements. Thus, the standard practice in many prior bankruptcy proceedings has been to negotiate cure agreements with purchasing carriers. For example, in the recent *Network Plus* case the parties entered into a stipulation, which the bankruptcy court approved, under which the bankrupt Network Plus assumed its interconnection agreements with Verizon and assigned those agreements to the acquiring carrier, Broadview, which paid an agreed cure amount to Verizon.

In the *Winstar* case, at the specific urging of the Bankruptcy Court, IDT adhered to the process established by section 365 for a time. IDT purported to engage in negotiations with Verizon, providing Verizon with a list of the existing special access circuits and resale arrangements that it intended to keep. IDT even made Verizon an offer with respect to the amounts necessary to cure the substantial prepetition debts owed to Verizon under Winstar's agreements for the service arrangements that IDT said it wishes to keep in place. But instead of continuing to attempt to resolve the appropriate cure amount, IDT reversed course completely and manufactured a "service emergency" to serve its goal of securing special treatment.

Indeed, IDT now has launched what appears to be a pre-planned and pre-prepared legal offensive in multiple fora that is designed to use the cover of the so-called emergency that IDT itself created in order to evade any cure requirements. The Bankruptcy Code does not, however, permit such manipulation.

If a bankrupt assumes its agreement with a carrier such as Verizon, the bankrupt must provide a cure for the amounts owed by it under the agreement for past services. *National Gypsum Co. v. National Gypsum Co. Settlement Trust*, 208 F.3d 498, 506 (5th Cir.), *cert. denied*, 531 U.S. 871 (2000) (debtors "must take full account of the cost to cure all existing defaults owed to the non-debtor party" because assumption "presumes curing all prepetition default[s]") (internal citation and quotation marks omitted); *Adventure Resources Inc. v. Holland*, 137 F.3d 786, 799 n.18 (4th Cir. 1998) (effect of assumption is that 'the estate acquires all of the debtor's rights *and* obligations under the contract') (quoting Jesse M. Fried, *Executory Contracts and Performance Decisions in Bankruptcy*, 46 Duke L.J. 517, 525 (1996) (emphasis in original).)

Similarly, if the bankrupt assumes and assigns the contract to an acquiring entity such as IDT, either the bankrupt entity (Winstar) or the acquiring entity (IDT) must cure all defaults under the contract. *See* 11 U.S.C. § 365(f)(2). IDT calls this "extortion," but it is black-letter bankruptcy law, applicable to any and all executory contracts, reflected in the very wording of the Code.[15/] Congressional intent to require the cure of defaults if a buyer wants to obtain the benefits of a bankrupt's contracts could not be more clear. To absolve a buyer of that obligation would be bad public policy, because it would be unfair to creditors and would set perverse incentives for debtors. Thus, it is not surprising that, as noted above, requiring a cure of defaults has been standard practice in prior bankruptcy proceedings.

II. THE COMMUNICATIONS ACT IS CONSISTENT WITH THE BANKRUPTCY CODE AND CANNOT BE READ TO TRUMP SECTION 365.

IDT argued in the Bankruptcy Court proceedings that, despite the express language of section 365, IDT should be exempt from having to cure the defaults of Winstar, because IDT is a telecommunications carrier covered by the provisions of the Communications Act. *See* April 15, 2002 Hearing Tr. at 13. The Bankruptcy Court rejected IDT's argument under the Bankruptcy

15/ Section 365 has a number of special provisions addressing particular types of executory contracts or unexpired leases. *See, e.g.*, 11 U.S.C. § 365(n). But none focuses on service arrangements in the telecommunications context and none provides any exception — for any contract of any kind — to the fundamental rule that assumption requires the cure of defaults and rejection constitutes a breach by the debtor of the agreement, allowing the non-debtor party to stop performing under the arrangement. *Id.* at § 365(g).

Code and declined to construe the Communications Act. *Id.* at 62-63. The Commission should make clear that nothing in the Communications Act adversely affects the rights of Verizon and other carriers under the Bankruptcy Code.

First, despite IDT's contentions to the contrary, there is no conflict between the provisions of section 365 of the Bankruptcy Code and the Communications Act. There is no doubt that, if IDT cured the defaults of Winstar, as it is obligated to do, IDT could assume Winstar's service arrangements with no change in the nature of service now enjoyed by the customers served by those circuits. The issue of interruption of service to existing Winstar customers has arisen only because IDT seeks to evade its obligation under section 365 of the Bankruptcy Code. Moreover, if there were a conflict between the Bankruptcy Code and the Communications Act, the Commission would not be free to resolve it by simply using the provisions of one statute to trump another. Potentially conflicting statutes must be read as complementary to, rather than in conflict with, one another. *See, e.g., Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) (giving effect to provisions of both the Bankruptcy Code and Judicial Code); *see also In re Cervantes*, 219 F.3d 955, 961-62 (9th Cir. 2000) (recognizing that section of Social Security Act could be construed in harmony with provisions of the Bankruptcy Code). Thus, Commission policy in this matter can and should be to accommodate both the need to minimize service disruption and the important bankruptcy policy embodied in section 365. *Cf. LaRose v. Federal Communications Commission*, 494 F.2d 1145 (D.C. Cir. 1974) (addressing need for Commission to reconcile policies of Communications Act and federal bankruptcy law).

Second, it is plain that this case involves the kind of debt and transaction that is covered by section 365. Here, IDT is buying the assets of a bankrupt entity, Winstar, which owes

Verizon significant amounts of prepetition debt on numerous service arrangements. And, after having 120 days to assess the potential profitability of all Winstar's service arrangements, IDT now seeks to take over selected Winstar's service arrangements with Verizon by substituting its name on the bills for Winstar's. If this arrangement does not qualify as an assumption and assignment, it is hard to imagine what would.[16]

To divert attention away from the obvious flaws in its position, IDT accuses Verizon (and other carriers) of "extortion" and obfuscation. Among other things, IDT maintains that Verizon's reliance on section 365 is a ruse to mask its true desire to discontinue service to Winstar and leave its customers without service. Pet. for Dec. Ruling at 2. This is simply not the case. Verizon participated in the Bankruptcy Court proceedings simply to establish its legal rights under the Bankruptcy Code both to secure the same cure payments as other creditors where its service arrangements are assumed and assigned, and to terminate service where executory contracts are rejected. Without those rights, Verizon is forced to continue to provide underlying carrier service as if an assumption and assignment had been effected, but as a practical matter is denied the ability to bargain for the cure that the law requires for such an assumption. Nothing in the Communications Act justifies a policy that produces that result.

In any event, Verizon has no interest in summarily discontinuing service in a manner that leaves customers unserved. Of course, a purchasing CLEC always can avoid such an outcome simply by causing the bankrupt CLEC to assume existing service arrangements and assign them to the purchaser. If the purchaser does not wish to take an assignment, the bankrupt CLEC may reject existing service arrangements, and, where the bankrupt carrier provides timely notice to its

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[16] As discussed below, this transaction also constitutes an assignment for the purposes of Verizon's federal tariff. *See infra* at 27.

customers, the customers can be transferred to their new carriers of choice through Verizon's standard CLEC-to-CLEC migration procedures. Even in the latter case, there is little risk of service disruption if the CLECs plan ahead, coordinate closely with each other, and coordinate with Verizon. When the new carrier places service orders well in advance, Verizon can in almost all circumstances cut the customer over to the purchaser in a manner that does not result in a significant disruption to the customer's service. It is only where, as IDT has done in this case, the purchasing CLEC tries to game the system, or otherwise waits until the last moment to provide appropriate notice to customers or to seek new service arrangements, that the risk of service disruption is heightened. Even then, Verizon does what it can to avoid disruptions during the transfer to the customer's new carrier of choice.

III. IDT'S ARGUMENTS BASED ON THE COMMUNICATIONS ACT SHOULD BE DISMISSED AS MERITLESS.

IDT uses a scattergun in arguing that, if Verizon were to exercise its bankruptcy law right to terminate rejected contracts, it would violate several sections of the Communications Act. But at bottom IDT simply asserts, without citation to any analogous situation, that such termination would be "unreasonable[]." Pet. for Dec. Ruling at 9. The measure of what is reasonable is in the facts. And what the facts show is that Verizon cooperated in every respect with the bankrupt Winstar and IDT. In turn, IDT abandoned negotiations over a mutually agreeable result under section 365, opting instead to attempt to avoid its obligations under that provision by filing emergency motions with this Commission and a federal district court. It was those actions, and Winstar's rejection of Verizon service arrangements, at the specific request of IDT, that precipitated this proceeding. So, if anyone should be held responsible under the Communications Act for any changes in service to Winstar's former customers, it should be IDT, not Verizon.

A. Applying Section 365 Should Not Result in a Disruption of Service for Winstar's Former Customers.

In an effort to mask its own role, IDT accuses Verizon of violating the Commission's Requirements for Carriers to Obtain Authority Before Discontinuing Service in Emergencies, Public Notice, DA 01-1257 (rel. May 22, 2001), which, among other things, urges carriers to "establish migration procedures that facilitate quick and seamless transfer of customers to comparable service from alternate providers," and describes steps that ILECs, CLECs, and IXCs can take to advance that goal. *Id.* But the facts show that Verizon has not violated this or any other applicable requirement. For the service arrangements that Winstar rejected and IDT did not buy out of bankruptcy, IDT may use the same process as any other CLEC that seeks to enter into a service arrangement, and to the extent customers of the former Winstar choose IDT as their new service provider, IDT may use the same CLEC-to-CLEC migration procedures as any other CLEC. Verizon simply maintains that the Commission should not deny Verizon and other carriers their rights under federal bankruptcy law; it is unnecessary to do so in order to accomplish the goal of minimizing service disruption.

If some of Winstar's customers now are uncertain who will next provide service to them, that is in large part due to the failure of IDT to give them timely and meaningful notice of Winstar's discontinuance of service. The Commission's rules, among other things, require "[a]ny domestic carrier that seeks to discontinue . . . service" to "notify all affected customers of the planned discontinuance . . . of service" and to provide notification of the discontinuance to the Commission. 47 C.F.R. § 63.71. IDT sent a notice to some but not all Winstar customers on March 15 and filed that notice with the Commission on March 18, providing only 30 days' notice. *See* FCC Order (April 18, 2002). Thus, even though IDT was certain that Winstar would discontinue service to many customers when IDT bought Winstar's assets in December of last

[redacted]

year, IDT waited until the last possible moment to notify any of those customers of that discontinuance.

But it was IDT's gamesmanship with respect to Winstar's remaining service arrangements — those neither assumed and assigned nor expressly rejected — that created the greatest uncertainty for Winstar customers and all others concerned. As to those arrangements and customers, as discussed above, IDT refused to assume and take an assignment. That meant that the existing arrangements to serve those customers were not part of what it purchased in the bankruptcy proceedings. But IDT also did not order new service in the same way as any other carrier involved in a CLEC-to-CLEC migration, and did not give *any* notice of discontinuance. In short, IDT's own conduct, not Verizon's, has reduced the opportunity of customers to make choices among competitive alternatives in the marketplace.

To prevent these types of circumstances from recurring in future bankruptcies, the Commission should clarify the circumstances that trigger the requirement to provide information to customers of a possible impairment of service under section 63.71.[17/] When a carrier files in Chapter 11 and initiates an auction of its assets, the carrier certainly should have to inform customers of a possible discontinuation of service. Unlike other Chapter 11 petitioners, who may truly expect to reorganize and continue operations, and thereby avoid any serious risk of

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17/ The Commission may provide such clarification by means of a public notice, as it did in the case of Requirements for Carriers to Obtain Authority Before Discontinuing Service in Emergencies, Public Notice, DA 01-1257, *supra*. In its prior notice, the Commission "direct[ed] carriers, and the industry as a whole, to develop systematic and effective approaches for ensuring that customers ar*e given sufficient notice before their service is scheduled to be discontinued in the future*." *Id.* (emphasis added). In light of the events in the *Winstar* bankruptcy and similar proceedings, Commission should elaborate on what is "sufficient" notice where a CLEC files for bankruptcy. Specifically, the Commission should clarify the circumstances under which carriers in bankruptcy are obligated to provide notice of possible discontinuance or transfer to their customers. Alternatively, the Commission should provide the needed clarification by granting Verizon's request for a declaratory ruling, as set forth below.

service disruption, a carrier that demonstrates an intent to sell its assets or put them up for auction knows that at least a minimal disruption in service is imminent. Similarly, upon filing a motion for sale or acceptance of a purchase agreement, a carrier should be required simultaneously to inform its customers that it will cease operations upon completion of the sale. Plainly, a carrier should have to take the same step when it converts from a Chapter 11 bankruptcy to one under Chapter 7. (The Commission also should grant the declaratory ruling for which Verizon petitions in the next section.)

Such a process need not result in the carrier's loss of local customers or other adverse effect. For example, when Rhythms filed its Chapter 11 petition, it notified its customers of that fact, warning of possible termination of service, and kept them informed of the progress of the bankruptcy proceeding and efforts to sell the assets. When the Rhythms assets were acquired by another carrier, few of Rhythms' customers had terminated service.

B. Verizon's Position Does Not Undermine Local Competition.

IDT attempts to invoke the mantra of local competition, asserting that, if Verizon and other carriers are permitted to assert their rights under section 365, it will be the death knell of the competitive local market. Pet. for Dec. Ruling at 13. Thus, IDT urges the Commission to create a new form of subsidy for failing carriers — absolve each bankrupt's successor of the bankrupt's debts because otherwise the successor too will fail. This request should also be rejected.

First, it is simply wrong that the survival of local competition depends on treating telecommunications carriers differently from all other entities whose executory contracts a CLEC assumes and assigns. There is no conceivable justification for a rule providing that banks, equipment providers, and other vendors are entitled to negotiate for a cure but ILECs and other carriers that provide telecommunications services to bankrupt entities may not. The failure to enforce the requirements Congress has prescribed in section 365 of the Bankruptcy Code for assumption and assignment with respect to service arrangements of ILECs and other carriers would be contrary not only to the Bankruptcy Code but also to the public interest. Forcing Verizon and other carriers to forego cures for millions of dollars of prepetition telecommunications services is ultimately going to harm all ratepayers, including those of local competing carriers, either through rate increases or reduced investment in network upgrades to maintain or increase service quality.

Second, the Bankruptcy Code's existing cure requirements will not adversely affect purchasers or bring about a chilling effect on future sales in CLEC bankruptcies. It is widely understood by the parties that participate in these bankruptcy auctions that any cure amounts that the purchaser is required to pay are reflected as a reduction in the purchase price offered for the debtor's assets or otherwise dealt with in the sale documents. All this really means is that the cure amounts paid to one set of creditors (the carriers and other non-debtor parties to the assumed executory contracts) reduce the amounts paid to other creditors, generally the debtor's bank lenders; the purchaser should be indifferent to the recipients of the payments, and the reallocation of proceeds from bank lenders and other creditors to the non-debtor parties to the contracts will have little, if any, effect on the sale. While the reduction in purchase price will reduce the assets available for distribution to the other creditors of the debtor (e.g., the secured bondholders and equipment providers), purchasers acting in good faith should be more than adequately protected. There would be little merit in a public policy that protects sophisticated bank lenders and others who voluntarily enter into commercial agreements with CLECs at rates that reflect commercial and lending risks, at the expense of ILECs who are under statutory obligations to enter into such agreements.

Conversely, such a shift of resources, from ILECs and other carriers to banks, would have a number of adverse effects. It would, for example, give defaulting CLECs an incentive to avoid paying their debts to other carriers. And it would subject ILECs and other carriers to a great deal of added risk. While this risk would obviously place a financial burden on ILECs and other carriers, it would also make all carriers less likely to tolerate nonpayment by CLECs or to incur any other forms of additional liability.

In short, there is simply no basis to deny ILECs or other carriers — there are almost a dozen on Winstar's list of creditors — the same legal right as any other vendor to seek to negotiate an appropriate cure amount.

C. Verizon's Position Would Violate Neither the Commission's Slamming Rules Nor the Provisions of Sections 202(a) and 203.

IDT contends that requiring it to cure Winstar's defaults before it steps into Winstar's shoes would violate both this Commission's slamming rules and the antidiscrimination provisions of the Act. Neither argument has merit. To begin, the Commission's slamming rules do not apply to Verizon in these circumstances. No customer is being transferred to Verizon without having an opportunity to exercise its choice. Moreover, to the extent Winstar's customers must choose again, it is because Winstar and IDT failed to give timely notice of discontinuance or sought to take advantage of both the Communications Act and the Bankruptcy Code without assuming the burdens of either.

Further, IDT's contention that Verizon has discriminated in any respect against IDT, apart from being unsupported by any facts, is simply false. In the *first* place, like any other CLEC, IDT could simply cause Winstar to "assign or transfer" its service arrangements to IDT.

For any interstate service arrangements, for example, Verizon's federal tariffs expressly allow a carrier such as IDT to assume the existing service arrangements of another carrier and specifies that the new carrier becomes liable for any outstanding debt.[18] Under that provision, Verizon would simply change the name of the CLEC customer on its bill and IDT would be liable for a cure of Winstar's indebtedness. As noted, IDT and Verizon were in negotiations over the cure amount when IDT did its about-face.

Alternatively, to the extent any of the customers of the former Winstar chooses IDT as its new carrier (or Winstar avails itself of the Commission's mass migration rules), IDT could have used the same CLEC-to-CLEC migration procedures that are available to any other CLEC. In other words, IDT could have requested its own service arrangements from Verizon well in advance — it had 120 days to do so in this case — and Verizon could have engineered and provisioned new service to IDT (subject to the availability of facilities). When Winstar requested termination of its service arrangements, Verizon would have been able to migrate the

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[18] Most of Winstar's interconnection agreements with Verizon contained language to similar effect. Those agreements provided that:

> "[e]ither Party may assign this Agreement or any of its rights or obligations hereunder to a third party, including, without limitation, its parent or other affiliate, with the other Party's prior written consent, which consent shall not be unreasonably withheld upon the provision of reasonable evidence by the proposed assignee that it has the resources, ability, and authority to provide satisfactory performance under this Agreement. Any assignment or delegation in violation of this subsection 29.7 shall be void and ineffective and constitute a default of this Agreement."

See, e.g., Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996, by and between Bell Atlantic - Pennsylvania, Inc. and Winstar Wireless of Pennsylvania, Inc. (November 22, 1996), §29.7.

customers to the new facilities ordered by IDT.[19/] In other words, Verizon would have provided service to IDT just as it does to any other CLEC.

Second, to the extent IDT is claiming that Verizon has not been willing to negotiate a cure with IDT, that too is simply false. The parties were negotiating a cure that would have allowed IDT to take advantage of an assignment or transfer. IDT made an offer; Verizon made a counteroffer; and then IDT tried to trump the process. Thus, it is IDT, not Verizon, that seeks a departure from the normal procedures in this case. IDT wants to take an assignment of Winstar's circuits without having to cure any of that entity's defaults, as Verizon's tariff and section 365 explicitly require.

Third, none of IDT's so-called "examples" of favored treatment of other entities has any validity. No meaningful analogy can be drawn between this case and the UNE combinations issue, Pet. For Dec. Ruling at 14, or the Genuity spinoff, *id.* at 16. Neither of those scenarios involved the application of section 365 or any other policy of the Bankruptcy Code, which are critical factors here. Indeed, Genuity did not involve the transition of service arrangements; that corporate entity already had its own arrangements in place before the spinoff. Nor did Verizon afford preferred or different treatment to the parties in the three proceedings referred to in IDT's footnote 39. Nothing in the Commission's notices or orders suggests otherwise, nor does anything in the actual events. Moreover, in none of those cases did a purchaser attempt the sleight of hand that IDT tries here, and in each case all competing carriers had the opportunity to

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[19/] Winstar makes much of statements in other fora that there may be limited instances in which facilities are not immediately available. In those cases too Winstar has the same options as other carriers: it can place the orders well in advance to minimize the instances where alternate facilities are not available at the time of the migration or it may assume the existing circuits and pay a cure.

compete for the affected customers and the customers were transitioned pursuant to the standard CLEC-to-CLEC procedures.

COUNTER-PETITION OF VERIZON FOR DECLARATORY RULING

The issue whether the transaction IDT demands constitutes an assumption for bankruptcy law purposes ultimately has to be made by the Bankruptcy Court. But there are three key rulings that the Commission can and should make here:

> (1) the Communications Act does *not* except carriers from the rights afforded by section 365 of the Bankruptcy Code;
>
> (2) where one CLEC wishes to take over another's service arrangement with nothing more than a name change, that constitutes "an assignment or transfer" within the meaning of Verizon's tariffs, so that the assignee/transferee CLEC must assume the outstanding indebtedness of the prior CLEC for such services; and
>
> (3) to the extent it does not do so separately by issuing a clarification of its previous public notice reflecting the obligation of carriers to provide notice to affected customers, the Commission should clarify the circumstances under which carriers in bankruptcy are obligated to provide notice of possible discontinuance or transfer to their customers.

For example, section 2.1.2 of Verizon's Tariff F.C.C. No. 1 provides in relevant part that, where no relocation or interruption of services occurs, an assignment or transfer of services may be made to:

> (1) another customer . . ., provided the assignee or transferee assumes all outstanding indebtedness for such services, and the unexpired portion of the minimum period and the termination liability applicable to such services, if any; or
>
> (2) a court-appointed receiver, trustee, or other person acting pursuant to law in bankruptcy . . ., provided the assignee or transferee assumes the unexpired portion of the minimum period and the termination liability applicable to such services, if any.

§ 2.1.2(A). The tariff further provides that "the assignment or transfer of services does not relieve or discharge the assignor or transferor from remaining jointly or severally liable with the assignee or transferee for any obligations existing at the time of the assignment or transfer." *Id.*

The IDT transaction at issue in this case is clearly covered by these provisions. Verizon's tariff is entirely consistent with section 365's requirement for cure of any indebtedness associated with any executory contract that is being assumed and assigned. The tariff plainly reaches what, as explained earlier, is a classic example of assignment: a case in which a purchasing carrier looks to step directly into the shoes of a bankrupt carrier — taking on its service arrangements and connections, and expressly assuming the bankrupt carrier's liabilities — with no more than a name change. *See, e.g.*, *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1018 (D.C. Cir. 1985) (an assignee is responsible for those obligations of the assignor that he expressly contracts to undertake); *Lachmar v. Trunkline LNG Co.*, 753 F.2d 8, 9-10 (2d Cir. 1985) (assignee of rights under a bilateral contract is bound to perform those duties of the assignor under the contract that he expressly assumes); *Trailways Finance v. Euro-Flo Tours, Inc.*, 572 F. Supp. 1227, 1231 (D.N.J. 1983) (affirming the proposition that an assignee of a contract "stands in precisely the same shoes as its assignors" vis-à-vis the other party to the contract).

Thus, the Commission should conclude that IDT is both covered by section 2.1.2 of Verizon's tariff and required to satisfy all of the requirements of that provision. If IDT is to have the benefit of placing its name on any of Winstar's circuits, it is only fair that it assume the liability associated with those arrangements and negotiate an appropriate cure. Placing the burden of those debts on Verizon would be not only unfair, but contrary to the public interests.

CONCLUSION

For the foregoing reasons, Verizon respectfully requests that the Commission reject IDT Winstar's petition for declaratory ruling. It also requests that the Commission grant its Counter-Petition for Declaratory Ruling.

Respectfully submitted,

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April 29, 2002

CERTIFICATE OF SERVICE

I, John Meehan, do hereby certify that on this 29th day of April, 2002, I caused true and correct copies of the foregoing Comments and Counter-Petition of Verizon to be served by messenger upon the following parties:

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